No. 09-343

Supreme Court, U.S.
FILED
OCT 2 1 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, *ET AL.*
v.
PIEDMONT ENVIRONMENTAL COUNCIL, *ET AL.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE JOSEPH T. KELLIHER, ELIZABETH ANNE MOLER, PATRICK HENRY WOOD III, AND JAMES J. HOECKER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The *amici*[1] are former chairmen of the Federal Energy Regulatory Commission (FERC), the principal regulator of the bulk power industry of the United States. The *amici* collectively served in that capacity during 1993-2009. During this period, Congress considered legislation to establish effective federal transmission siting authority, resulting in enactment of section 216 of the Federal Power Act, and FERC issued final rules implementing its new siting authority, the rules reviewed by the Fourth Circuit. The *amici* have been responsible for the regulatory initiatives and responses to Congressional directives identified in this brief and have testified before Congress on transmission policy matters in their former official capacity. They have also participated in legislative consideration of federal transmission

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution towards the preparation or submission of this brief; no person made a monetary contribution towards the preparation or submission of this brief other than the *amici curiae* and their counsel, and FPL Group, Inc., which contributed printing costs. All parties have consented to the filing of this brief in letters filed with the Clerk.

legislation. The *amici* are experts on transmission policy matters, collectively have decades of experience on energy policy, and offer an informed perspective on the policy consequences of the Fourth Circuit's decision. The *amici* are all participating in their individual capacities.

SUMMARY OF ARGUMENT

This case involves a matter of pervasive national interest. The Fourth Circuit decision nullifies the intent of Congress to strengthen the interstate electric transmission system. It undermines two decades of national policy designed to promote wholesale competition across the increasingly stressed interstate grid. It also hinders the expansion of transmission that is critical to the development of renewable resources like wind and solar power.

The nation's transmission system is aging, does not adequately serve major renewable resources where they exist in abundance, and is inadequate to meet the needs of the digital age and growing demands for reliable electric power. Although states remain the initial arbiters of which transmission projects can be built, only federal authority can guarantee that facilities that serve the needs of competitive wholesale markets and customers across a region can be sited on the basis of the broad public interest.

This case is about whether an individual state should be empowered to veto critical interstate transmission projects, contrary to the statutory

scheme adopted by Congress. It is about sacrificing a key building block in the edifice of national competitive electric policies that have emerged with the support of several Congresses, four Administrations, and numerous major regulatory orders over a quarter century, including those to create transmission open access and to encourage regional transmission organizations. We respectfully urge the Court to review the decision below.

The federal siting provisions of the bipartisan Energy Policy Act of 2005 mark the first time in 70 years that Congress reconsidered its decision in 1935 to leave siting of interstate electric transmission facilities in the hands of state and local governments. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221 (2005) (codified at 16 U.S.C. § 824p (2008)). Over those seven decades, electricity delivery and power markets had fundamentally changed. What was once a host of individual local delivery systems had evolved to large interstate and even international grids. Markets that were once local and noncompetitive evolved into robust competitive interstate wholesale markets. *New York v. FERC*, 535 U.S. 1, 7-8 (2002).

Congress recognized these changes and enacted section 216 of the Federal Power Act, which provides for federal siting of electric transmission facilities, under specific circumstances, in "national interest electric transmission corridors." 16 U.S.C. § 824p (2008). That provision was preemptive, but not exclusive, since it allowed state and local governments to continue to site transmission facilities. Section 216 is part of a comprehensive federal scheme to set and

enforce grid reliability standards, assure open transmission access and encourage grid investment, building upon reforms undertaken by FERC to ensure a transmission system adequate to the needs of the 21st century.

Against this backdrop, the Fourth Circuit justifies a restrictive interpretation of section 216 by asserting that the problem Congress was trying to solve was state inaction, and imposition of "project-killing conditions." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 314-15 (4th Cir. 2009). This conclusion is based on speculation and inferences drawn by the court from the statutory language rather than resort to the legislative history. A review of the legislative history of section 216 reveals that Congress was indeed concerned not only about state siting delays but also about state denials of transmission siting approval, and fully intended to preempt states and allow federal transmission siting where states had denied approval.

The result of the Fourth Circuit decision is nullification of the comprehensive statutory scheme erected by Congress with respect to U.S. transmission policy. The goal of Congress was to strengthen the interstate power grid to support competitive markets, assure reliability, and promote development of renewable energy capacity. Congress recognized that development of large interstate transmission projects is necessary to accomplish those policy goals, and also appreciated that state and local siting is poorly suited for development of such projects. For that reason, Congress provided for federal transmission siting.

By enacting the first change in transmission siting law in 70 years on a bipartisan basis, Congress intended to change the status quo and provide for siting decisions that reflect a national or regional perspective, rather than single state parochial views. The Fourth Circuit decision serves largely to restore the status quo ante, by vitiating federal siting authority in an area that was of great interest to Congress – where states have rejected transmission projects. The Fourth Circuit decision frustrates the will of Congress.

While federal regulation indisputably extends to the use of the interstate electric transmission system and to ensuring reliability of the grid, the Fourth Circuit has interpreted Congress' intent as maintaining each state's veto authority over new interstate electric transmission facilities no matter how vital to the national interest. Indeed, this is held by the Fourth Circuit to be Congress' intent even where the subject facilities are in "a national interest electric transmission corridor" important to economic growth and vitality, electricity supply diversification, energy independence, and national defense and homeland security. Federal Power Act § 216(a), 16 U.S.C. § 824p(a) (2008).

ARGUMENT

I. EFFECTIVE FEDERAL TRANSMISSION SITING IS IN THE NATIONAL INTEREST.

A. The National Interest in the Interstate Transmission System Has Evolved.

When the principal federal electricity law, the Federal Power Act, was passed, the U.S. could not fairly be said to have had an interstate grid. *New York,* 535 U.S. at 5. Over the intervening 75 years, however, as technology for long-distance transmission improved and isolated electric systems were interconnected, what once was a series of local delivery networks became an interstate grid. *Id.* at 1. Today's grid is not only interstate but international, since the U.S. transmission system is fully interconnected with Canada and part of Mexico. Because the grid in the Lower 48 is interstate, any transmission facility attached to the interstate grid is interstate, even if it does not cross a state line. *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972).

The interstate transmission system is now vital to three areas of great national interest. First, the transmission grid supports competitive markets, by removing constraints that result in higher prices and greater price volatility. The federal role with respect to interstate transmission established by the Energy Policy Act of 2005 is only the latest in a series of important statutory and regulatory reforms that Congress and FERC have undertaken to promote wholesale competition through transmission open

access.[2] The Energy Policy Act of 2005 is a natural extension of these past reforms and recognizes that the competitive benefits of transmission open access will be limited if the grid itself is constrained.

This Court has recognized the relationship between greater competition and the evolution of the transmission grid:

> In recent decades, the Commission has undertaken an ambitious program of market-based reforms. Part of the impetus for those changes was technological evolution. Historically, electric utilities had been vertically

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[2] The Energy Policy Act of 1992, Pub. L. No. 102-486, permitted the creation of new entities, "exempt wholesale generators," that could generate and sell electricity at wholesale without being regulated as public utilities. FERC Order No. 888 sought to eliminate undue discrimination in the provision of transmission service by requiring that each public utility with transmission facilities offer unbundled transmission service pursuant to a standard Open Access Transmission Tariff (*pro forma* OATT). *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). FERC Order No. 2000 encouraged utilities to voluntarily join independent regional transmission organizations that would operate their transmission facilities on a non-discriminatory basis and administer the OATT. *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), *aff'd sub nom. Public Util. Dist. No. 1 of Snohomish Cty v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

> integrated monopolies. For a particular geographic area, a single utility would control the generation of electricity, its transmission, and its distribution to consumers. Since the 1970's, however, engineering innovations have lowered the cost of generating electricity and transmitting it over long distances, enabling new entrants to challenge the regional generating monopolies of traditional utilities.
>
> To take advantage of these changes, the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity. It has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly—namely, the transmission grid that conveys the generated electricity—cannot exert monopolistic influence over other areas.

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty, 554 U.S. __, 128 S. Ct. 2733, 2740 (2008) (internal citations omitted).

Second, the transmission grid supports reliability. In the years leading up to enactment of the Energy Policy Act of 2005, the U.S. had experienced eight large regional blackouts, including the largest

blackout in U.S. history in August 2003.[3] In the Act, Congress sought to help avoid future such events by enacting the siting provisions at issue here, as well as a comprehensive federal program of mandatory reliability standards. Energy Policy Act § 1211.

Third, the transmission grid is necessary to promote development of renewable energy resources, which tend to be concentrated in areas remote from the current interstate grid. This matter was important to Congress in 2005, and, as discussed in detail in the next section, it has become even more important as national energy and environmental policies lead the country to develop clean energy supplies. U.S. Dep't of Energy, National Transmission Grid Study xi, 4, 10, 19-21 (2002); U.S. Dep't of Energy, 20% Wind Energy By 2030 93, 100 (2008) (hereinafter "Wind Energy Study").

Congress recognized the vital national interest that transmission serves and understandably decided to end the states' exclusive role in siting transmission facilities so that the national interest could be protected when necessary.

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[3] U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations, Chapter 7 (2004).

B. Effective Federal Transmission Siting Is Essential to a National Clean Energy Policy.

The United States Government is in the process of implementing a new energy and environmental policy designed to sharply reduce carbon emissions from electric generation facilities and other sources, while assuring adequate electricity supply at a reasonable cost.[4] This reduction will be accomplished in large part by changing U.S. electricity supply away from use

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[4] President's Remarks on Energy Legislation, Daily Comp. Pres. Doc. (June 26, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900513.pdf; Statement of Administration Policy on H.R. 2454, American Clean Energy and Security Act of 2009, Executive Office of the President, Office of Management and Budget (June 26, 2009), *available at* http://www.whitehouse.gov/omb/assets/sap_111/saphr2454h_20090626.pdf; Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1); Proposed Rulemaking to Establish Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. ___ (proposed Sept. 30, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Mandatory Reporting of Greenhouse Gases, 40 C.F.R. pts. 86, 87, 89, 90, 94, 98, 1033, 1039, 1042, 1045, 1048, 1061, 1054, 1065 (2009); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 311 (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. tit. I (2009).

of fossil fuels, in part by technology deployment, in part by other means.[5]

If the U.S. electricity supply is going to change, the grid must also change, since the grid is merely a delivery system. The central challenge facing U.S. transmission policy now is the need to develop a clean energy grid that can efficiently deliver an entirely different electricity supply across regional power markets.

Renewable energy or clean energy potential is not evenly distributed in the United States, and some regions have a much greater endowment than others. Wind Energy Study at 24. This is illustrated by a map of solar and wind resources prepared by the National Commission on Energy Policy, Ending the Energy Stalemate, Table 4-14 (2004):

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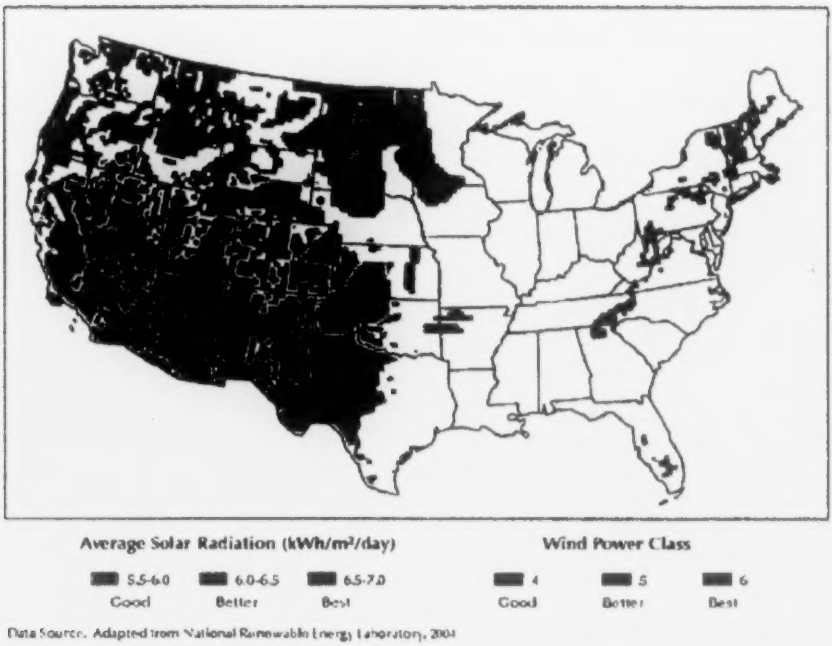
[5] U.S. Energy Info. Admin., Energy Market and Economic Impacts Of H R. 2454, The American Clean Energy and Security Act of 2009 ix (2009); Electric Power Research Inst., Creating Our Future: Meeting The Electricity Technology Challenge 20 (2009), *available at* http://mydocs.epri.com/docs/SummerSeminar09/Specker09SumSem.pdf; McKinsey & Co., Reducing U.S. Greenhouse Gas Emissions: How Much at What Cost? xv, 58-66 (2007).



Regions with the greatest natural endowment of renewable energy potential tend to be remote from the interstate power grid, isolated by transmission constraints. Wind Energy Study at 75. Maximizing U.S. renewable energy supplies is a core element of clean energy and environmental policy. *Id.* at 13-14, 107; Midwest Independent Transmission System Operator, Inc., *et al.*, Joint Coordinated System Plan '08 at 7.

If the United States is going to maximize its renewable energy supply, it must build out a clean energy grid and remove those constraints. Wind Energy Study at 2, 10-12, 93, 95-98; Joint Coordinated System Plan '08 at 4-9. Effective federal siting of transmission facilities is necessary to develop that grid in the timeframe envisioned by carbon policy.

National carbon and clean energy policy, expressed in pending legislation and regulatory orders issued by the U.S. Environmental Protection Agency (EPA), envisions significant reductions of carbon emissions beginning as soon as 2012.[6] Significantly, EPA has initiated a series of actions to implement this new national policy,[7] and legislation has advanced in Congress.[8]

There are important policy consequences to continued reliance on state and local transmission siting procedures and the lack of effective federal transmission siting. It means the U.S. will expand grid capacity at a much slower rate than would be possible under federal transmission siting. It means development of the highest-quality, low-cost renewable energy potential in regions remote from the grid will be forestalled or postponed. It also means the change in U.S. electricity supply will occur much more slowly than would be possible under federal siting.

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[6] American Clean Energy and Security Act of 2009 § 311; Clean Energy Jobs and American Power Act tit. I; Proposed Rulemaking to Establish Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454, 49460 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600).

[7] *See supra* note 4.

[8] The U.S. House of Representatives passed H.R. 2454, *supra* note 4, on June 26, 2009, and bills are pending in the Senate.

C. State and Local Siting of Interstate Transmission Facilities Has Proven Inadequate to Meet the Evolving Need.

Until enactment of the Energy Policy Act of 2005, the United States sited electric transmission facilities under a 1935 statute that reflected the nature of the grid as it was at the time, relying on state and local siting of privately owned transmission lines. *Piedmont,* 558 F.3d at 310. In 1935, electricity delivery was essentially local in nature, and it is thus not surprising that the Federal Power Act did not provide for federal transmission siting by the Federal Power Commission, the predecessor agency to the FERC. Instead, Congress reserved siting of transmission facilities to the states. Federal Power Act § 201, 16 U.S.C. § 823c (2008). State siting authorities and policies vary substantially, with some states vesting sole authority in a single state agency or public utility commission while others delegate it to a host of affected local governments. Nat'l Council on Elec. Policy, Electricity Transmission: A Primer 11 (2004).

State and local siting can be an efficient way to site certain transmission facilities, particularly smaller single state projects that benefit the siting state. National Transmission Grid Study at E-7, E-42. But state and local siting is poorly designed to site large interstate transmission projects whose benefits extend to an entire region or the nation. *Id.* at 53, E-42; Wind Energy Study at 99. However, it is precisely this category of transmission project that needs to be built to meet national energy and environmental policy

goals, including supporting competitive markets, by removing constraints that result in higher prices and greater price volatility, assuring grid reliability, and maximizing renewable energy development. National Transmission Grid Study at 58; Midwest Independent Transmission System Operator, Inc., *et al.*, Joint Coordinated System Plan '08, 7, 9 (2008).

There are two principal problems with state and local siting of large interstate transmission projects. First, state and local transmission siting proceedings of large projects take too long, especially when approval is needed from multiple jurisdictions. It can take more than ten years to obtain siting approval for transmission projects that cross multiple states. For example, the Jacksons Ferry transmission line between Virginia and West Virginia, involving two state commissions and a federal land agency, took 13 years to site, and less than three years to construct. That is true even though the project was recognized as critical to the reliability of the Eastern grid. U.S. Dep't of Energy, Electric Power Outages in the Western United States, July 2-3, 1996, 82, 85 (1996).

The great length of the transmission siting process is a particular problem for renewable energy projects such as wind and solar farms. Renewable resources are typically located in remote areas of the country.[9] Renewable projects can be built quickly, but are unlikely to be built in locations where they lack access

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[9] Wind Energy Study at 75.

to an unconstrained interstate power grid and would face unpredictable curtailments that interrupt sales.

One way to demonstrate the failure of state and local transmission siting of large interstate transmission projects is to contrast it with what is possible under federal siting of interstate natural gas pipelines, where federal siting authority is exclusive and preemptive.[10] In recent years FERC has sited thousands of miles of interstate natural gas pipelines,[11] while states have sited very little multi-state electric transmission lines.[12] Furthermore, it is possible to site very large interstate natural gas pipelines in a matter of months, while it can take years for states to site much smaller electric

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[10] Natural Gas Act § 7(h), 15 U.S.C. § 717f (h) (2008). The original Natural Gas Act also reserved siting of interstate natural gas pipelines to the states. But in 1947 Congress concluded that reliance on state and local siting of these interstate facilities had failed and amended the Act to provide for exclusive and preemptive federal siting. Natural Gas Act Amendments of 1947, Pub. L. No. 80-245, 61 Stat. 459 (1947).

[11] Between 1997 and 2002, FERC sited 9,316 miles of interstate natural gas pipelines. Fed. Energy Regulatory Comm'n, Approved Pipeline Projects (2009), *available at* http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp.

[12] Between 2000 and 2007, states sited 668 miles of cross-border lines 230 kV and higher. Fed. Energy Regulatory Comm'n, Electric Transmission Siting, presentation (2007), slide 2, *available at* http://www.ferc.gov/industries/electric/indus-act/siting/trans-siting-present.pdf.

transmission facilities.[13] Large natural gas pipelines can be conceived, proposed, sited, constructed, and begin operation in 2-3 years,[14] while those steps can take 10 years or longer for electric transmission facilities of comparable size.

The second problem with state and local transmission siting is that siting large interstate transmission projects necessarily involves balancing local impacts against regional benefits, and state and local officials cannot be expected to adequately weigh regional or national benefits. The duty of a state or local official is to a single state or local government, not to a region or the nation. Prior state siting decisions reflect an inability or unwillingness by state and local officials to properly weigh benefits to neighboring states in siting decisions.[15]

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[13] Rockies Express Pipeline–West, which crosses five states and exceeded 700 miles, was sited by FERC in 11 months, and the MidContinent pipeline, which crossed five states and exceeded 500 miles, was sited by FERC in 9 months. *See supra* note 11. As noted above, siting the Jacksons Ferry transmission line, which crossed two states and was only 90 miles long, took 13 years.

[14] Rockies Express Pipeline–West took less than 3 years from conception to operation. Rockies Express Pipeline – West, *available at* http://www.rexpipeline.com/index_west.html.

[15] *See e.g.*, Arizona Corp. Comm., *In the Matter of Southern California Edison Co.*, Docket No. L-00000A-06-0295-00130, Decision No. 69638 (June 6, 2007), *available at* http://images.edocket.azcc.gov/docketpdf/0000073735.pdf (denying power line certificate in part because primary beneficiary would be California); Connecticut Siting Council, *TransÉnergie U.S. Ltd.*, Docket No. 197, Opinion (March 28, 2001), *available at*

Even if there are countervailing regional benefits, the narrow focus of state and local review remains local impacts. In the face of this lopsided balancing, electric transmission projects may be abandoned or withdrawn early in the process, anticipating that siting approval had become a Sisyphean task. A prominent characteristic of state and local transmission siting is its sheer unpredictability with respect to length of state and local siting review, the likelihood of success, and the influence of political considerations on state and local siting decisions. That stands in sharp contrast with the predictability of the FERC natural gas pipeline siting process.

Congress recognized the problems associated with state and local siting of interstate transmission facilities, which is why the law was changed in 2005. The federal role established in the Energy Policy Act of 2005 was manifestly preemptive, but not exclusive. Even the Fourth Circuit recognized the federal siting provisions of the Energy Policy Act of 2005 were preemptive. *Piedmont*, 558 F.3d at 313. The only debate is regarding the scope of federal preemption intended by Congress.

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http://www.ct.gov/csc/cwp/view.asp?a=958&Q=247616 (denying power line certificate in part because primary beneficiary would be New York).

II. CONGRESS INTENDED TO GRANT FERC SITING AUTHORITY WHERE STATES HAVE DENIED PROJECT APPROVAL.

A. National Energy Policy Identified State Rejection of Siting Approval as a National Problem and Proposed Federal Preemption.

It is not a simple matter to mark the beginning of a legislative process that resulted in enactment of new law. However, the legislative history of the federal transmission siting provisions of the Energy Policy Act of 2005 can be traced back to May 2001. It was on May 16, 2001 that the Bush Administration issued the National Energy Policy proposal in part to modernize our energy infrastructure. Nat'l Energy Policy Dev. Group, National Energy Policy at xi (May 16, 2001). The National Energy Policy proposed a series of electricity legislative reforms that resulted in the electricity provisions in the Energy Policy Act of 2005. *Id.* at 5-21, 7-17.

One of the most important policy proposals in the National Energy Policy was the recommendation that the President direct the Secretary of Energy to "develop legislation to grant authority to obtain rights-of-way for electricity transmission lines, with the goal of creating a reliable national transmission grid. Similar authority already exists for natural gas pipelines in recognition of their role in interstate commerce." *Id.* at 7-17. This recommendation began the first serious legislative effort to change the siting process for electric transmission since the 1930s, and

led to enactment of the federal siting provisions of the Energy Policy Act of 2005.

The National Energy Policy also identified state and local transmission siting as a causal factor in the development of constraints in the power grid. *Id.* at 7-7. Importantly, the National Energy Policy specifically identified state *rejections* of transmission projects as a causal factor in transmission constraints, specifically citing state rejection of a proposed line between Connecticut and Long Island[16] and identifying state rejections of proposed transmission projects as a problem to be remedied by federal legislation.[17]

The express reference to the natural gas pipeline statutory model in the National Energy Policy, the discussion of state rejections of siting approvals as a causal factor in grid constraints, and the proposal for federal legislation to establish effective federal siting authority modeled on the preemptive natural gas siting model, all demonstrate that preempting state rejections of siting approvals was an objective of federal transmission siting legislation from the very

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[16] National Energy Policy at 7-7 ("State decisions on where to locate transmission lines often do not recognize the importance of proposed transmission facilities to the interstate grid. For example, a recent decision by regulators in Connecticut to *block* a proposed transmission line to Long Island did not recognize the need for electricity on Long Island.") (emphasis added).

[17] *Id.* ("Some state siting laws require that the benefits of a proposed transmission facility accrue to the individual state, resulting in the *rejection* of transmission proposals that benefit an entire region, rather than a single state.") (emphasis added).

beginning of the legislative process that led to enactment of the Energy Policy Act of 2005.

B. Legislative History Manifests Congressional Intent to Grant FERC Authority to Site Transmission When States Have Denied Approval.

Altogether, Congressional consideration of legislation based on the National Energy Policy proposal that resulted in the Energy Policy Act of 2005 took about four years and spanned three Congresses. Congressional intent with respect to the grant of federal transmission siting authority is made plain through a review of the relevant legislative history. Federal transmission siting legislation took two forms during this period. From December 2001 until June 2004, the relevant legislative provisions authorized FERC to site transmission when a state has "withheld approval" or has "delayed final approval for more than 1 year after the filing of an application seeking approval."[18] From June 2004 through enactment of the Energy Policy Act of 2005, the legislation used the final form that is in section 216 as enacted, namely authorizing FERC siting where a state "withheld approval for more than 1 year after the filing of an application."[19] Unfortunately, the Fourth Circuit

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[18] H.R. 3406, 107th Cong. § 402 (2001); H.R. 6, 108th Cong. § 16012 (2003); H.R. 1644, 108th Cong. § 7012 (2003).

[19] H.R. 4503, 108th Cong. § 1221(a) (2004); S. 2095, 108th Cong. § 1221(a) (2004); H.R. 6, 109th Cong. § 1221(a) (2005).

ignored the first part of the legislative history of the federal transmission siting provisions of the Energy Policy Act of 2005, and based its conclusions regarding Congressional intent on an incomplete legislative history.

In the wake of the National Energy Policy, the Bush Administration sent its legislative recommendations for electricity legislation to Congress, including a recommendation for federal transmission siting authority both where a state "withholds approval, conditions approval to make a project economically infeasible, or delays approval."[20] Legislation was introduced shortly thereafter that closely mirrored that Bush Administration recommendation.[21] That bill was the first legislative step in the process that led to the Energy Policy Act of 2005. Significantly, that bill included federal transmission siting provisions that authorized FERC to site transmission where a state "has *withheld approval*, conditioned its approval in such a manner that the proposed construction or modification is not economically feasible, or *delayed final approval* for more than one year after the filing of an application seeking approval."[22]

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[20] Letter from the Honorable Dan Brouillette, Assistant Sec'y of Energy for Congressional and Intergovernmental Affairs, U.S. Dep't of Energy, to The Honorable Jeff Bingaman, Chairman, S. Comm. on Energy and Natural Resources 2 (Oct. 9, 2001).

[21] Electric Supply and Transmission Act, H.R. 3406, 107th Cong. § 402 (2001).

[22] *Id.* § 402 (emphasis added).

It is important to note that this initial bill distinguished between "withholding approval" and "delaying final approval," which is at the heart of the dispute in *Piedmont*. There are three important conclusions that must be drawn by comparing this legislation to section 216. First, in this context, "withholding approval" must mean something different than "delaying final approval," or the bill would not have provided separate authorizations. Second, "withholding approval" in this context must mean denial of approval, rather than "delaying final approval," otherwise authorizing federal siting where states "delayed final approval" would be superfluous. Third, the authorization for FERC to site transmission where a state has "withheld approval" was not limited to a one-year period. That time limitation applied only to "delaying final approval."

Congress held hearings on this bill, and clearly understood the meaning of these terms.[23] Specifically, the scope of federal preemption under the original version of the legislation, and whether the legislation authorized FERC to site transmission in the face of state denials, was discussed at the Congressional

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[23] *Electric Supply and Transmission Act of 2001, Hearings Before the H. Comm. on Energy and Committee, Sub. on Energy and Air Quality*, 107th Cong. 4-5, 8, 18, 32, 39, 43, 56-7, 78-80, 115-16, 122-23, 124, 133 (statements of Reps. Boucher, Shimkus, Sawyer, Wilson, Bryant, Barton) (2001).

hearings.[24] Statements made by subcommittee members indicate they understood the "withheld approval" language would authorize FERC to site transmission even where states had *rejected* transmission projects.[25] One subcommittee member stated the siting language would allow FERC to review "every" siting decision made by states, including rejections.[26] The following exchange between another subcommittee member and the Deputy Secretary of Energy about interpretation of the legislative language is revealing:

> MR. ALLEN: [A]s I read the transmission provisions, it seems to say that States that say no to a transmission project that the Secretary of Energy considers vital to solve interstate [transmission] congestion areas, will lose their right to say no in the future. ...
>
> MR. McSLARROW: ... I believe that you are correct.[27]

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[24] *Comprehensive National Energy Policy, Hearings Before the H. Comm. on Energy and Committee, Sub. on Energy and Air Quality*, 108th Cong. 13, 59, 67-8, 297, 303 (statements of Reps. Brown, Allen, Boucher, Dingell) (2003).

[25] *Id.*

[26] *Id.* at 13 (statement of Rep. Brown).

[27] *Id.* at 67-8 (statements of Rep. Allen and Dep. Secretary McSlarrow).

This remained the form of federal transmission siting legislation for more than two and a half years.[28] The legislative history of bills with the initial formulation of federal transmission siting language makes plain that Congress intended to authorize FERC to site transmission where states have denied approval. H.R. Rep. No. 108-65, Part I, at 170, 342 (2003). Legislation that included these siting provisions passed the U.S. House of Representative on April 11, 2003.

The form of the siting provisions changed in June 2004, with introduction of H.R. 4503, the "Energy Policy Act of 2004." Energy Policy Act of 2004, 108th Cong. § 1221(a) (2004). This bill was the first measure that used the transmission siting language reflected in section 216, namely "withheld approval for more than 1 year." The legislative history of this bill is sparse, lacking a committee report and relevant House floor debate.

But the intent of the new language becomes clear by comparing it to the earlier version and tracking the changes. In the earlier bill, "withheld approval" unambiguously did not mean "delay approval," since that bill contained a separate authorization for FERC to site transmission where states "delayed final approval." Given that separate authorization, "withheld approval" meant "denial." Previously, the time limitation of "more than 1 year" applied only to

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[28] H.R. 3406, 107th Cong. § 402 (2001); H.R. 6, 108th Cong. § 16012 (2003); H.R. 1644, 108th Cong. § 7012 (2003).

"delaying final approval," not on "withholding approval." The revised language dropped the reference to "delaying final approval" altogether, and moved the time limitation to the "withheld approval" term for the first time.

The most reasonable interpretation is that when Congress struck "delayed final approval" from the new formulation and attached the time limitation to "withheld approval" beginning in June 2004, it did not intend to limit federal siting to circumstances where states had failed to act. For two and a half years, "withheld approval" had *never* meant "delayed final approval" and had consistently meant FERC would be authorized to site transmission where states have denied approval. There is no basis to believe that Congress intended that "withheld approval" in this new formulation would suddenly serve as a synonym for "delayed final approval." If that is what Congress had intended, it would have been a simple matter to strike "withheld approval" instead of "delayed final approval" and use the latter term instead. But that is not what Congress did, and that choice is meaningful. Congress retained "withheld approval," deleted "delayed final approval" and applied the time limitation of the latter to the former. In that light, the conclusion must be drawn that when Congress began to use the term "withheld approval for more than 1 year" Congress intended that "withheld approval" would continue to include denials, but it also intended to expand the meaning of the term to include "delaying final approval," or else applying the time limitation would be nonsensical.

C. Congress Did Not Intend a Nullity.

If the Fourth Circuit's decision is left standing, FERC will have to amend its rule and strip out the provisions that authorize federal siting where states have denied siting approval. Doing so would eliminate most of the preemptive effect in a statute that even the Fourth Circuit recognized was preemptive. *Piedmont,* 558 F.3d at 313. That will entirely change the character of section 216. The end result of the Fourth Circuit decision is that federal transmission siting will become a very unlikely event, restoring the law to the status quo ante that governed before enactment of the Energy Policy Act of 2005, a status quo that Congress found unacceptable and had resolved to change. When engaged in statutory construction "Congress will not be presumed to have done a useless, ineffective, or absurd thing." *Consumers Union of the United States v. Sawhill,* 512 F.2d 1112, 1126 (Em. App. 1975).

Incorrect construction of section 216 by the Fourth Circuit has great national importance. Whatever improvement was made in federal transmission siting by Congress with enactment of the Energy Policy Act of 2005 would be lost under the *Piedmont* decision. By interpreting "withheld approval" to mean FERC can only site transmission when states withhold approval by delaying action, rather than by denying approval, the Fourth Circuit has rendered section 216 useless.

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 21, 2009